IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

PAMELA MONTGOMERY, individually and as guardian of THOMAS J. MONTGOMERY,	:	C.A. No. 04C-11-048 WLW
Plaintiffs,	:	
v.	:	
MARK ACHENBACH, POYNTER'S TREE FARM AND CHRISTMAS SHOP INC. and ROBIN ACHENBACH	:	
Defendants.	:	

Submitted: November 24, 2008
Decided: January 23, 2009

ORDER

Upon Defendant Poynter's Tree Farm and Christmas Shop, Inc.'s Motion for Summary Judgment. *Granted*.
Upon Plaintiff's Motion for Partial Summary Judgment. *Denied*.

Jennifer Kate Aaronson, Esquire of Law Office of Jennifer Kate Aaronson, LLC, Wilmington, Delaware; attorneys for the Plaintiffs.

Nancy E. Chrissinger Cobb, Esquire of Chrissinger & Baumberger, P.A., Wilmington, Delaware; attorneys for Defendant Mark Achenbach.

R. Stokes Nolte, Esquire of Nolte & Associates, Wilmington, Delaware; attorneys for Defendant Robin Achenbach..

Jeffrey A. Young, Esquire of Young & McNelis, Dover, Delaware; attorneys for Defendants Poynter's Tree Farm and The Christmas Shop.

WITHAM, R.J.

FACTS AND PROCEDURAL HISTORY

On June 28, 2004, Mark Achenbach ("Mr. Achenbach") was driving his personal vehicle when he collided with Thomas J. Montgomery ("Plaintiff") at the intersection of Woodyard Road and Route 13 in Harrington, Delaware. At the time of the accident, Mr. Achenbach was driving Allen Chorman ("Mr. Chorman"), who owns an aerial spraying company, back to his place of business. Mr. Achenbach had taken Mr. Chorman to his property to view a bagworm infestation of the trees, and to get an estimate for the aerial spraying of insecticide.

Poynter Tree Farm and Christmas Shop, Inc. ("PTFCSI" or "Defendant") is an incorporated entity that operates Poynter's Tree Farm ("Poynter's Tree Farm") and The Christmas Shop, Inc. ("The Christmas Shop"). The Christmas Shop is a retail store which operates between Thanksgiving and Christmas each year, and sells Christmas trees. Poynter's Tree Farm is owned by Robert and Bonnie Poynter ("the Poynters") and supplies Christmas trees for The Christmas Shop.

The multiple tracts of land where the Christmas trees are grown are owned by the Poynters, Mr. Achenbach's wife Robin ("Mrs. Achenbach") individually, and Mr. and Mrs. Achenbach jointly, and run contiguously, bordered by a tract of tall "border trees." Mrs. Achenbach, who is the Poynters' daughter, leases a portion of her individual property to the Poynters for the purpose of growing Christmas trees. In addition, both Mr. and Mrs. Achenbach assist the Poynters with operating the

Christmas Shop during the holiday season.[1]

In June 2004, Mr. Achenbach noticed a bagworm infestation of the border trees on the property.[2] At his deposition, Mr. Achenbach testified that on Thursday, June 24, 2004, he asked Mr. Poynter to have the border trees aerially sprayed with insecticide.[3] Mr. Achenbach testified that the trees needed to be aerially sprayed because they had grown too tall to be effectively sprayed from the ground.[4] According to both Mr. Achenbach's and Mr. Poynter's deposition testimony, Mr. Poynter said no to having the trees aerially sprayed because Mr. Poynter believed it would be too expensive.[5] Mr. Achenbach testified that the Poynters went on vacation the next day, Friday, June 25, 2004.[6]

On June 28, 2004, at approximately 9:00 a.m., Mr. Achenbach contacted Mr.

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[1] Mrs. Achenbach testified that she assisted with the operations inside the Christmas Shop during the holidays, while Mr. Achenbach worked outside, helping customers load the trees onto their cars. Dep. of Mrs. Achenbach at 8. The Achenbachs have full-time employment not related to PTFCSI.

[2] Bagworms are mobile and could infest all tracts of the contiguous property if not exterminated. Dep. of Mr. Poynter at 25. Mr. Achenbach testified that the Christmas trees had been sprayed in May by the Poynters. Dep. of Mr. Achenbach at 85.

[3] Dep. of Mr. Achenbach at 59.

[4] *Id*. at 66.

[5] *Id*. at 65; Dep. of Mr. Poynter at 65.

[6] It is unclear from the deposition testimony how long the Poynters were away on vacation. Mrs. Achenbach testified that she was out of the state when Mr. Achenbach arranged for the aerially spraying and when the spraying was accomplished, and that she did not give Mr. Achenbach the authority to have the trees aerially sprayed. Dep. of Mrs. Achenbach at 24.

Chorman to inquire about having the border trees aerially sprayed with insecticide.[7] Mr. Chorman agreed to meet with Mr. Achenbach at approximately 4:30 that afternoon to view the border trees that needed to be sprayed, and Mr. Achenbach agreed to drive Mr. Chorman to and from the property.[8]

Mr. Chorman sprayed the border trees on June 29, 2004, and provided Mr. Achenbach with an invoice for $225.00.[9] A bill for the spraying, dated July 23, 2004, arrived at the Achenbach home in late July 2004, and the bill was placed on a desk in the Achenbach home.[10] Mr. Poynter, Mr. Achenbach, and Mrs. Achenbach each testified that one evening, when the Poynters were at the Achenbachs' home for dinner, Mr. Poynter saw the bill for the aerial spraying and agreed to pay for it, intending to use it as a business deduction.[11] Mr. Poynter testified that he was

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[7] Mr. Achenbach testified that he knew of Mr. Chorman's aerial spraying company through Mrs. Chorman, who is a co-worker of Mr. Achenbach. Dep. of Mr. Achenbach at 59.

[8] Mr. Achenbach testified that he brought Mr. Chorman to the portion of the property owned jointly by Mr. and Mrs. Achenbach. *Id*. at 57-58.

[9] The invoice was mailed to Mr. Achenbach's home address, "c/o Poynter's Tree Farm."

[10] Mrs. Achenbach testified that she opened the bill and placed it on the desk. Dep. of Mrs. Achenbach at 5. Mr. Achenbach testified that he gave the bill to Mrs. Achenbach to pay. Dep. of Mr. Achenbach at 70. They both agree, however, the bill was to be paid out of their household account. In its July 26, 2007 Order, this Court denied Mrs. Achenbach's motion for summary judgment, finding that a jury could conclude that Mr. Achenbach was acting as Mrs. Achenbach's agent when he prepared to have the border trees sprayed. *Montgomery v. Achenbach*, 2007 WL 3105812, at *4 (Del. Super. Jul. 26, 2007).

[11] Dep. of Mr. Poynter at 24; Dep. of Mr. Achenbach at 70; Dep of Mrs. Achenbach at 13.

unaware that the spraying had been done before seeing the bill.[12] On August 6, 2004, the bill was paid on a check drawn on a Poynter's Tree Farm account.[13] PTFCSI took a business deduction in 2004 in the amount of $225.00 for the aerial spraying.[14]

On January 16, 2008, Defendant PTFCSI filed a Motion for Summary Judgment. Plaintiff filed an opposition to Defendant's motion on March 25, 2008, and filed a Cross-Motion for Partial Summary Judgment on the issue of agency.

On October 6, 2008, Plaintiff's counsel sent a letter to the Court indicating that the attorneys in this case agreed that Plaintiff's Motion for Partial Summary Judgment should be addressed before any other pending motions.[15] This request was granted by the Court on October 7, 2008. On October 13, 2008, Plaintiff's counsel sent a letter to the Court indicating that upon further research of the issues, he concluded that judicial admission is the controlling legal concept in the case, based on the recent Delaware Supreme Court decision in *Merritt v. United Postal Service*.[16]

The Court allowed letter briefs on the theory of judicial admission. On November 18, 2008, Defendant filed a response concerning judicial admission. On

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[12] Dep. of Mr. Poynter at 24.

[13] Pl.'s Opp'n to Def.'s Mot. for Summ. J. at Ex. C.

[14] *Id*. at Ex. D.

[15] Plaintiff's Motion for Sanctions against PTFCSI for Bonnie Poynter's Repeated Refusal to Attend Depositions, and Defendant's Motion to Reconsider the Commissioner's Order Allowing Plaintiff to Amend the Complaint are pending.

[16] 956 A.2d 1196 (Del. 2008).

November 21, 2008, Plaintiff filed a reply, and on November 24, 2008, Defendant responded.

Plaintiff's Arguments

Plaintiff argues that his Motion for Partial Summary Judgment should be granted on the question of agency. Plaintiff contends that because PTFCSI took a business deduction on its 2004 tax return for the aerial spraying, Defendants should be estopped from claiming that Mr. Achenbach was not acting as an agent of PTFCSI when he drove Mr. Chorman to and from the property to view the border trees. Furthermore, Plaintiff argues that the 2004 tax return should be treated as a judicial admission, based on the Delaware Supreme Court holding in *Merritt v. United Parcel Service*.

Defendant's Arguments

Defendant PTFCSI argues that summary judgment should be granted in its favor because Mr. Achenbach has never been an agent, servant, or employee of PTFCSI, and has never had the authority, either direct or apparent, to bind, encumber, or act on behalf of PTFCSI. Furthermore, Defendant maintains that Mr. Achenbach was having the trees aerially sprayed, not for PTFCSI, but for himself. As a result, no issues of material fact exist, and summary judgment is appropriate.

STANDARD OF REVIEW

Summary judgment should be rendered only if the record shows that there is no genuine issue as to any material fact and the moving party is entitled to judgment

as a matter of law.[17] "The moving party bears the burden of establishing the non-existence of material issues of fact."[18] The facts must be viewed in the light most favorable to the non-moving party.[19] "Once the moving party meets its burden, then the burden shifts to the non-moving party to establish the existence of material issues of fact."[20] Once the burden shifts, the non-moving party may not rest on its own pleadings, but instead provide evidence showing a genuine issue of material fact.[21] "If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of her case, then summary judgment must be granted."[22]

DISCUSSION

1. Whether Judicial Notice Should be Taken Based on a Tax Deduction.

Plaintiff argues that the Court should take judicial notice that Mr. Achenbach was working as an agent for PTFCSI when he drove Mr. Chorman to and from the property to estimate the cost of aerial spraying because the Poynters took a tax deduction for the cost of the spraying as a business expense. The Court finds,

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[17] Super. Ct. Civ. R. 56(c).

[18] *Schunck v. Del. Transit Corp.*, 2007 WL 1748647 at *1 (Del. Super. 2007).

[19] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[20] *Schunck*, 2007 WL 1748647 at *1.

[21] *Id.*

[22] *Id.*

however, that judicial admission is inapplicable to this matter.

"A judicial admission is a formal statement by a party or his or her attorney, *in the course of judicial proceedings*, which removes an admitted fact from the field of controversy."[23]

> A judicial admission, *deliberately drafted by counsel for the express purpose of limiting or defining the facts in issue*, is traditionally regarded as conclusive . . . Th[e] [judicial] admission is not merely another layer of evidence, upon which the [ ] court can superimpose its own assessment of weight and validity. It is, to the contrary, an unassailable statement of fact that narrows the triable issues in the case.[24]

"The determination of whether a party's statement is sufficiently unequivocal to be a judicial admission is a question of law."[25] The Court may determine that other facts are necessarily implied from the judicial admission.[26]

Plaintiff argues that, based on the Delaware Supreme Court's holding in *Merritt v. United Parcel Service*, the Poynters' sworn statement to the IRS that the aerial spraying of the border trees was a legitimate business expense is a judicial

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[23] *Krauss v. State Farm Mut. Auto. Ins. Co.*, 2004 WL 2830889, at *4 (Del. Super. Apr. 23, 2004).

[24] *Merritt*, 956 A.2d at 1202 n.18, quoting *Airco Indus. Gases, Inc. v. Teamsters Health and Welfare Pension Fund*, 850 F.2d 1028, 1036-37 (3d Cir. 1988).

[25] *Krauss*, 2004 WL 2830889, at *4, quoting 29A Am. Jur. 2d, *Evidence* § 770 (1994).

[26] *Id*. (determining that the plaintiff's statement in her complaint that she was eligible for PIP coverage under the insured's policy was a judicial admission, and the fact that the plaintiff was a member of the insured's household was necessarily implied from that judicial admission).

admission. In the *Merritt* case, the Court determined that the defendant's admission that the plaintiff's disability was "on-going," made during an Industrial Accident Board hearing, "merits the same treatment as a judicial admission."[27]

A hearing before the Industrial Accident Board is a quasi-judicial proceeding, and therefore, knowing concessions of facts made by a party in statements contained in the pleadings, stipulations, depositions, testimony, responses to requests for admissions, or counsel's statements to the Board are considered judicial admissions.[28]

> The Industrial Accident Board is a quasi-judicial Board performing judicial functions. It determines issues raised by litigants before it. It sits as an impartial referee. In many instances, the issues are tried before it by counsel representing the litigants. Appeals from the Industrial Accident Board are taken by the losing litigant and opposed by the successful litigant.[29]

When the Poynters filed their 2004 tax return, listing the aerial spraying as a legitimate business expense, they were not engaged in any judicial or quasi-judicial proceeding. Therefore, the business deduction taken in 2004 for the aerial spraying of the border trees cannot be considered a judicial admission.

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[27] *Id*. at 1201.

[28] *Merritt*, 956 A.2d at 1201.

[29] *Application of Diamond State Tel. Co.*, 113 A.2d 437, 449 (Del. 1955) (comparing the IAB with the Public Service Commission, which is not a quasi-judicial body, but an administrative body exercising delegated legislative powers).

2. Whether PTFCSI is Precluded by Estoppel from Asserting that Mr. Achenbach was Not an Agent of PTFCSI.

Plaintiff argues that because the Poynters took a deduction on their 2004 tax return for the aerial spraying of the border trees, Defendant should be estopped from denying that Mr. Achenbach was an agent of PTFCSI at the time of the accident. Plaintiff argues that the two positions are inconsistent, and that when PTFCSI accepted the benefit of the tax deduction, it established Mr. Achenbach's agency at the time of the accident.

"Quasi-estoppel applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit."[30] This Court, in *LeFebvre v. Delmar Appliance of Delaware, Inc.*,[31] found that the tax records of the defendant were not evidence of an agency relationship that would estop the defendant from denying an agency relationship.[32] In *LeFebvre*, a retired employee of the defendant was in an accident with the plaintiff while driving a vehicle belonging to the defendant for his personal use.[33] The defendant knew of the retiree's use of the vehicle, and deducted all of the vehicle's

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[30] *Personnel Decisions, Inc. v. Bus. Planning*, 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008) (internal quotations omitted).

[31] 2001 WL 392389 (Del. Super. Mar. 23, 2001).

[32] *Id*. at *2.

[33] *Id.*

expenses as a business expense on the defendant's tax return.[34] This Court found that the tax records established only that the defendant owned the vehicle.[35] The tax records did not prove that an agency relationship existed, or that the retiree was performing at the pleasure of the defendant when the accident occurred.[36]

In the case *sub judice*, the Poynters' business deduction for the aerial spraying is not evidence of an agency relationship between PTFCSI and Mr. Achenbach. The Court finds that the tax records establish only that PTFCSI paid for the spraying. The tax records do not prove that an agency relationship existed between PTFCSI and Mr. Achenbach, or that Mr. Achenbach was working for PTFCSI the day before the spraying, when Mr. Achenbach drove Mr. Chorman to and from the Achenbach property to inspect the border trees. Therefore, Defendant is not estopped from denying an agency relationship between PTFCSI and Mr. Achenbach. Because judicial admission and quasi-estoppel are inapplicable in the case *sub judice*, Plaintiff's motion for partial summary judgment must be denied.

3. Whether, as a Matter of Law, Mr. Achenbach Was Acting as an Agent of PTFCSI at the Time of the Accident.

In its Second Amended Complaint, Plaintiff alleges that Defendant PTFCSI is liable under the theory of *respondeat superior* because Mr. Achenbach was acting as an agent, servant, and/or employee of PTFCSI at the time of the accident. The Court

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[34] *Id.*

[35] *Id.*

[36] *Id.*

finds this argument to be without merit.

"An agency relationship is created when one party consents to having another act on its behalf, with the principal controlling and directing the acts of the agent."[37] One type of agency relationship is characterized by the term "master/servant."[38] This is generally the employer/employee relationship, where the employee is the servant or agent, subject to physical control by the employer, who is the master or principal.[39]

In the case *sub judice*, Plaintiff has presented no evidence to indicate that Defendant PTFCSI and Mr. Achenbach were in any sort of employment relationship. Therefore, the Court will determine whether Plaintiff has presented any evidence to indicate that Mr. Achenbach had express, implied, or apparent authority to bind PTFCSI.

> Express authority may be conveyed to the agent, either orally or in writing. Implied authority may be evidenced by conduct of the principal. Apparent authority may be evidenced by the conduct of an agent who holds himself out as possessing authority with the apparent consent or knowledge of the principal. In these circumstances, the principal cannot deny the agent's authority.[40]

Plaintiff has not presented any evidence that Mr. Achenbach was operating

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[37] *Fisher v. Townsends, Inc.*, 695 A.2d 53, 57 (Del. 1997), quoting *Sears Mortgage Corp v. Rose*, 634 A.2d 74, 79 (1993).

[38] *Fisher*, 695 A.2d at 58, citing Restatement (Second) of Agency § 2 (1958).

[39] *Id.*

[40] *Jack J. Morris Assocs. v. Mispillion St. Partners*, 2008 WL 3906755, at *3 (Del. Super. Aug. 26, 2008).

under express authority to bind PTFCSI. Mr. Achenbach was not acting under the oral or written direction of Mr. or Mrs. Poynter on the day of the accident. In fact, Mr. Poynter specifically told Mr. Achenbach that he was unwilling to pay for any aerial spraying of the border trees, and the Poynters were out of town when Mr. Achenbach brought Mr. Chorman to and from the property and when the aerial spraying was done.

Plaintiff has also failed to present any evidence that Mr. Achenbach had the implied authority of PTFCSI to contact Mr. Chorman, to drive Mr. Chorman to and from the property, or to hire him to spray the border trees. Implied authority allows the agent to act "based on the agent's reasonable interpretation of the principal's manifestation in light of the principal's objectives and other facts known to the agent."[41] Both Mr. Poynter and Mr. Achenbach testified that Mr. Poynter refused to pay for the aerial spraying, and Mr. Achenbach testified that he was acting on his own behalf when he hired Mr. Chorman. Mr. Achenbach testified that he only brought Mr. Chorman to the portion of the property that belonged to the Achenbachs, and not to the Poynters' property. In addition, Mr. Achenbach had the bill for the spraying sent to his private residence, and both Mr. and Mrs. Achenbach testified that they intended to pay for the spraying out of their household account.

Finally, Plaintiff has not presented any evidence that Mr. Achenbach had apparent authority to act for PTFCSI on the day of the accident. "Apparent authority

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[41] *Delaware Dep't of Educ. v. Doe*, 2008 WL 5101623, at *1 (Del. Ch. Nov. 21, 2008), quoting *Dweck v. Nasser*, 2008 WL 4809031, at *7 (Del. Ch. Jul. 2, 2008).

can be demonstrated when the principal knowingly permits the agent to assume authority to act on its behalf so as to preclude denial of its existence."[42] Plaintiff has not provided any evidence that Mr. Achenbach held himself out as an agent of PTFCSI, or that Mr. or Mrs. Poynter ever knowingly permitted Mr. Achenbach to assume authority to act on PTFCSI's behalf.

Because the Court finds that no employment relationship existed between PTFCSI and Mr. Achenbach, and that Mr. Achenbach possessed no express, implied, or apparent authority to act on behalf of PTFCSI, no genuine issue of material fact exists, and summary judgment must be granted in favor of Defendant PTFCSI.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is DENIED, and Defendant PTFCSI's Motion for Summary Judgment is GRANTED. This decision renders Defendant's Motion for Reconsideration of the Commissioner's Order Granting Plaintiff's Request to Amend the Complaint to Add the Poynters as Individual Defendants MOOT.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
R.J.

WLW/dmh
oc: Prothonotary
xc: Order Distribution

[42] *Id*. (internal quotations omitted).